

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLEE**



76-7568

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----X  
RENE GRINAN, :

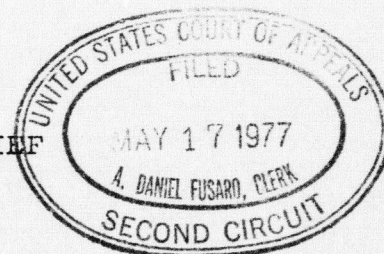
Plaintiff-Appellant :

-against- :

STATE OF NEW YORK, Division of Human Rights, :

Defendant-Appellee.  
-----X

DEFENDANT-APPELLEE'S BRIEF



LOUIS J. LEFKOWITZ  
Attorney General of the  
State of New York  
Attorney for Defendant-  
Appellee  
Office & P.O. Address  
Two World Trade Center  
New York, New York 10047  
Tel. No. (212) 488-7422

GEORGE D. ZUCKERMAN  
DOMINICK J. TUMINARO  
Assistant Attorneys General  
of Counsel

TABLE OF CONTENTS

---

	<u>PAGE</u>
Preliminary Statement. . . . .	1
Question Presented . . . . .	2
Statement of Facts . . . . .	3
ARGUMENT -                   THE COMPLAINT, LIBERALLY CONSTRUED WAS PROPERLY DISMISSED SINCE IT IS COMPLETELY DEVOID OF ANY SOUND BASIS FOR THE EXERCISE OF JURISDICTION BY THE DISTRICT COURT. . . . .	5
Conclusion . . . . .	9

TABLE OF CASES

---

	<u>PAGE</u>
<u>Eisen v. Eastman</u> 421 F. 2d 560 (2d Cir. 1969) . . . . .	7,8
<u>Erdmann v. Stevens</u> 458 F. 2d 1205 (2d Cir. 1972) . . . . .	7
<u>Meyer v. State of New York</u> 344 F. Supp. 1377 (SDNY 1971) . . . . .	7
<u>Monroe v. Pape</u> 365 U.S. 167 (1961) . . . . .	7

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----X

RENE GRINAN, :

Plaintiff-Appellant :

-against- :

Docket No.  
76-7568

STATE OF NEW YORK, Division of Human Rights, :

Defendant-Appellee. :

-----X

DEFENDANT-APPELLEE'S BRIEF

Preliminary Statement

This is an appeal by the plaintiff-appellant, who has proceeded ab initio pro se, from a judgment of Judge Jack B. Weinstein in the Eastern District of New York, entered on the 20th day of October, 1976, which dismissed the complaint for lack of jurisdiction. The action was commenced on or about July 22, 1976 by service of a complaint (styled "affidavit") upon the New York State Division of Human Rights, defendant-appellee at its regional office in Jamaica, Queens. On August 12, 1976 Defendant timely moved to dismiss the complaint or in the alternative for summary judgment. The matter came to be

heard on the merits on October 13, 1976, before Judge Weinstein, who treated the motion as one for summary judgment. Thereafter the District Court granted defendant's motion and dismissed the complaint for lack of jurisdiction and plaintiff-appellant filed a notice of appeal on October 20, 1976.

Neither defendant-appellee nor its counsel received any papers from plaintiff-appellant in this appeal. Counsel was first apprised that the plaintiff-appellant had filed his brief and appendix by Mr. John Brascia of this Court's Clerk's office on May 6, 1977, by which time defendant-appellee's time for filing responsive papers had already expired. This brief is submitted together with a motion pursuant to Rule 26(b) of the Federal Rules of Appellate Procedure for permission to file this brief in light of the circumstances above mentioned.

#### QUESTION PRESENTED

Did the District Court properly Dismiss the Complaint For Lack of Jurisdiction where a pro se complainant proceeding against a State Agency failed to satisfy jurisdictional prerequisites under 2000e-5(f)(1) and failed to sue individual defendants.

### STATEMENT OF FACTS

On February 3, 1975, Rene Grinan, plaintiff-appellant herein, filed a complaint with the New York State Division of Human Rights alleging that his employer, Sea View Hospital and certain individuals associated with that facility, had discriminated against him by denying him equal terms and conditions of employment on account of his race, color and national origin. Mr. Grinan described himself in that complaint as a Black Cuban.

The above mentioned complaint was withdrawn by Mr. Grinan on April 18, 1975 pursuant to the terms of a conciliation agreement which provided inter alia that efforts would be made by the New York City Health and Hospitals Corporation to transfer Mr. Grinan to a different facility.

Mr. Grinan was subsequently transferred to Goldwater Hospital where, after sustaining injuries on the job, he had a dispute with his supervisor concerning procedures for filing his Workmen's Compensation claim. Whereupon he filed another complaint with the Division of Human Rights on March 1, 1976.

The Division of Human Rights, defendant-appellee herein, issued a determination and order after investigation

dated May 28, 1976 dismissing Mr. Grinan's second complaint for want of "probable cause" (a copy of the Division's order is part of the record below as Defendant's Exhibit A and is annexed hereto).

Without appealing the adverse finding of "no probable cause", and without a "Right to Sue" letter issued pursuant to 42 U.S.C. 2000e et seq. Mr. Grinan commenced an action in the Eastern District Court against the defendant state agency which had issued an adverse determination on the second complaint he had lodged with it. The plaintiff purported to ground the district court's jurisdiction upon 42 U.S.C. 2000e-5, but also invoked jurisdiction based on alleged violations by the state defendant of 42 U.S.C. §§ 1981-1988.

Defendant moved to dismiss pursuant to Rule 12 b(6) or in the alternative for summary judgment. District Judge Jack B. Weinstein treating the motion as for summary judgment, held a hearing on the merits on October 13, 1976, hearing testimony of Mr. Rene Grinan, the plaintiff, and argument of counsel for the State Division of Human Rights. (See Transcript). After hearing Judge Weinstein dismissed the complaint for lack of jurisdiction observing inter alia:

THE COURT: There is nothing I can do here. You have not followed the proper procedure to challenge the discrimination by your taking an appeal from the State authority or by going to the Federal authority and getting a letter permitting you to bring a suit in this Court. I cannot hear a proceeding against any gency; only against individuals. You haven't named individuals.  
(Transcript p. 22)

Plaintiff-appellant appealed to this Court but never served counsel for defendant-appellee as he was required to under F.R.A.P. Rule 25(b). He assertedly served the regional office of the State Division of Human Rights in Jamaica, Queens but it too did not, in fact, receive any papers. Counsel for defendant-appellee was first apprised of the appeal being perfected by a call from the Clerk's office on May 6, 1977.

#### ARGUMENT

THE COMPLAINT, LIBERALLY CONSTRUED,  
WAS PROPERLY DISMISSED SINCE IT IS  
COMPLETELY DEVOID OF ANY SOUND BASIS  
FOR THE EXERCISE OF JURISDICTION BY  
THE DISTRICT COURT

The pro se complaint herein, styled as an "affidavit" is, to say the least, difficult to comprehend, perhaps

reflecting the layman's unfamiliarity with substantive and procedural aspects of federal pleadings and practice and his difficulty with English as a second language.\* Even if this pro se complaint is read with the appropriate benevolence it is unclear from its face as to what the state defendant is charged with and what jurisdictional basis is asserted.

In paragraph 1 of the complaint jurisdiction is purportedly invoked pursuant to 42 U.S.C. §§ 1981-1988 and 2000e-2, 2000e-3, 2000e-5, 2000e-13, 2000h-2. Of these sections only 42 U.S.C. 2000e-5(f)(1) is jurisdictional. But it deals with complaints of discrimination in employment and requires compliance with prerequisites which were not complied with by the plaintiff-appellant i.e. no charge was filed with the Equal Employment Opportunity Commission and no "right to sue" letter was issued by the Commission. It may be added, of course, that the defendant state agency had no employer-employee relationship with the plaintiff as is also contemplated by the nature of the rights and remedies provided for under the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq.

---

\* The complainant was assisted by an interpreter at the hearing before J. Weinstein (See Transcript).

Plaintiff's invocation of 42 U.S.C. §§ 1981-1988 similarly provides no jurisdictional basis since these sections are not in their nature jurisdictional, they require (in particular § 1983) the jurisdictional implementation of 28 U.S.C. § 1343(3). Eisen v. Eastman 421 F. 2d 560 (2d Cir. 1969). Moreover, even if the plaintiff had properly pleaded a cause of action under 42 U.S.C. 1983, and its jurisdictional counterpart, 28 U.S.C. § 1343(3) jurisdiction would still be lacking since under the Civil Rights Act the State of New York, Division of Human Rights is not a "person" within the meaning of 42 U.S.C. 1983. Monroe v. Pape, 365 U.S. 167, 191 (1961); Erdmann v. Stevens, 458 F. 2d 1205, 1208 (2d Cir. 1972); Meyer v. State of New York, 344 F. Supp. 1377, 1378 (S.D.N.Y. 1971).

Even if it is assumed arguendo that the complaint is to be construed as one charging an individual state officer of the Division of Human Rights with "discrimination" against the plaintiff-appellant, Mr. Rene Grinan, and even if the pleading had grounded jurisdiction in 28 U.S.C. 1343(3) this case would still be one of those wherein exhaustion of state administrative remedies is required. Eisen v. Eastman 421 F. 2d 560, 569 (2d Cir. 1969). In language apposite to the instant case this

Court said in Eisen v. Eastman supra, that exhaustion of state administrative remedies in cases under the Civil Rights Act would still be required "when a complaint alleged that a subordinate state officer had violated the plaintiffs constitutional rights by acting because of bias or other inadmissible reasons, by distorting or ignoring the facts, or by failing to apply a constitutional state standard, and the state has provided for a speedy appeal to a higher administrative officer. . .". Eisen v. Eastman supra at p. 569. In the instant case as the District Court noted (Transcript pp. 13, 22), the plaintiff could have and should have appealed the adverse determination to the Human Rights Appeal Board. (See New York Executive Law, Article 15 § 297-a). Instead he chose to commence an action against the state agency in the District Court. The District Court properly dismissed the complaint for lack of jurisdiction.

CONCLUSION

The Decision and Order of the  
District Court Dismissing the  
Complaint Should be Affirmed.

Dated: New York, New York  
May 13, 1977

Respectfully submitted,

LOUIS J. LEFKOWITZ  
Attorney General of the  
State of New York  
Attorney for Defendant-  
Appellee

GEORGE D. ZUCKERMAN  
DOMINICK J. TUMINARO  
Assistant Attorneys General  
of Counsel

Rene Grinan

Complainant

vs.

City of New York Health and Hospital Corporation;  
Goldwater Memorial Hospital; Francis Celano,  
Director of Personnel; Howard Garrison, Director  
of Nursing; M'dred Crisp, Assistant Director  
Respondent of Nursing

Case Nos. 1e-GC-1151-76  
GC-41592-76

DETERMINATION AND ORDER AFTER INVESTIGATION

On March 1, 1976, Rene Grinan, who filed a previous complaint, filed a verified complaint with the State Division of Human Rights charging the above-named respondent with an unlawful discriminatory practice relating to employment by retaliating against him through termination for having filed a previous complaint because of retaliation, in violation of the Human Rights Law of the State of New York.

After investigation, the Division of Human Rights hereby determines that there is no probable cause to believe that the respondents engaged in or are engaging in the unlawful discriminatory practice complained of.

This determination is based on the following:

Complainant alleges that respondent retaliated against him for filing a previous complaint and violated a Conciliation Agreement entered into to settle that complaint in that respondent suspended him and threatened him with termination.

The record reveals that complainant injured himself while on duty. Respondent has an established procedure applicable to all employees who are injured while on duty. This procedure requires employees who are injured while on duty to submit to periodic examinations by respondent's physician and to obtain permission to absent themselves from duty. Complainant absolutely refused to submit to such examinations by respondent's physician and absented himself without permission for an extended period of time. Respondent notified complainant that his continued failure to abide by the regulations would result in disciplinary action and possible termination. Complainant considered himself to be protected from such discipline by the prior Conciliation Agreement and so not required to submit to respondent's rules and regulations applicable to other employees.

EXHIBIT "A"

Since complainant knowingly and willingly disregarded respondent's established procedures applicable to employees in similar circumstances, respondent lawfully applied the available disciplinary procedures and warned complainant that further disregard for the rules and regulations would result in his termination.

There is no reason to believe the respondent retaliated against complainant.

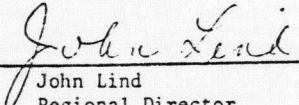
The complaint is therefore ordered dismissed and the file is closed.

THE COMPLAINANT OR ANY PARTY TO THE PROCEEDING BEFORE THE DIVISION MAY APPEAL THIS ORDER TO THE STATE HUMAN RIGHTS APPEAL BOARD AT TWO WORLD TRADE CENTER, 82nd FLOOR, NEW YORK, N. Y. 10047, BY FILING A NOTICE OF APPEAL WITHIN FIFTEEN (15) DAYS AFTER THE DATE OF SERVICE OF THIS ORDER.

DATED: MAY 28 1976

STATE DIVISION OF HUMAN RIGHTS

By

  
John Lind  
Regional Director

TO: Mr. Rene Grinan, complainant  
157- 14th Street  
Hoboken, New Jersey 07030  
P.O. Box 278

City of New York,  
Health & Hospital Corporation, respondent  
Goldwater Memorial Hospital, respondent  
Roosevelt Island  
Queens, New York

Att: Mr. Francis Celano,  
Director of Personnel

Mr. Francis Celano, respondent  
Director of Personnel  
City of NY Health & Hospital Corp.  
Goldwater Memorial Hospital  
Roosevelt Island  
Queens, NY

Mr. Howard Garrison, respondent  
Director of Nursing  
Goldwater Memorial Hospital  
Queens, NY 10017

Ms. Mildred Crisp, respondent  
Asst. Director of Nursing  
Goldwater Memorial Hospital  
Roosevelt Island  
Queens, NY

CC: Steven J. Goldsmith, Esq.  
Labor Relations Counsel